UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FOURTH REGION

WYMAN GORDON PENNSYLVANIA, LLC	:	
	:	
	:	
AND	:	CASES 04-CA-182126,
	:	04-CA-186281, and
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC	:	04-CA-188990
	:	
	:	
	:	
	:	
	:	

RESPONDENT'S REPLY BRIEF IN FURTHER SUPPORT OF ITS EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Lori Armstrong Halber, Esquire
Rick Grimaldi, Esquire
Samantha Sherwood Bononno, Esquire
FISHER & PHILLIPS LLP
150 N. Radnor Chester Rd., Suite C300
Radnor, Pennsylvania 19087
Tel. (610) 230-3150
lhalber@fisherphillips.com
rgrimaldi@fisherphillips.com
sbononno@fisherphillips.com

Attorneys for Wyman Gordon Pennsylvania, LLC

Respondent Employer Wyman Gordon ("Wyman" or the "Company") files this reply in further support of its exceptions in light of the General Counsel's answering brief. The General Counsel, consistent with his brief in support of his exceptions, takes such liberties with the law that Wyman must again correct the record. Wyman filed its exceptions on September 17, 2018 and, to the extent that submission addresses issues raised in the General Counsel's answering brief, Wyman incorporates those arguments herein. However, Wyman must further clarify the following points: 1) the General Counsel conflates the *Levitz* requirement of objective evidence of loss of majority support at the time of withdrawal with the requirement that the employer authenticate the petition (the objective evidence itself) at trial; and 2) Wyman's interpretation of *Scomas of Sausalito, LLC v. Nat'l Labor Relations Bd.*, 849 F.3d 1147 (D.C. Cir. 2017) is indeed correct and the General Counsel's unfounded and unnecessary attack is meritless.

I. Wyman properly authenticated the petition at trial.

The General Counsel has repeatedly, and incorrectly, argued that evidence in support of the petition's validity provided at trial rather than obtained at the time of withdrawal is irrelevant. This is a misunderstanding of *Levitz*. Under *Levitz Furniture Co.*, 333 NLRB 717 (2001), the employer has to prove by a preponderance of the evidence that a union has lost majority support. After the General Counsel has established a withdrawal of recognition at the hearing, the Respondent meets its defensive burden by introducing a petition ostensibly signed by at least half of the unit employees. *Flying Foods Grp. dba Flying Foods*, 345 NLRB 101, n. 9 (2005); *Levitz Furniture Co.*, 333 NLRB at 725 (noting that a petition signed by a majority of the employees in the bargaining unit is objective evidence that the union has lost majority support). To establish the Union's loss of majority support via petition, an employer must authenticate the petition at trial. "Signatures may be authenticated by the testimony of the signer, a witness to the signature,

delivery to the solicitor of the card, or by handwriting exemplars that sometimes involve the testimony of an expert witness." *Ambassador Servs., Inc.*, 358 NLRB No. 130 (2012); *adopted in part*, 361 NLRB 939 (2014).

Given that the petition can be authenticated by *testimony*, the employer does not have to authenticate the signatures at the time that it withdraws recognition—it must do so during the hearing. *See, e.g., Flying Food Grp.*, 345 NLRB 101, 103, n.9 (2005) ("We do not rely on any implication in the judge's decision that, under *Levitz*, an employer's withdrawal of recognition is unlawful where the employer fails to verify the authenticity of a disaffection petition before withdrawing recognition."). To argue otherwise is to ignore that *Levitz* announces an objective standard that seeks to determine the facts, rather than what an employer believes. As stated by the Fourth Circuit: "The *Levitz* standard focuses on the Act's policy of promoting employee choice by determining *actual* employee desires, rather than employers' *beliefs* about employee desires, by asking whether there was *in fact* majority support for the union at the time the employer withdrew recognition, *regardless of what the employer believed*." *NLRB v. B.A. Mullican Lumber*, 535 F.3d 271, 282 (4th Cir. 2008) (emphasis added). The evidence offered by Wyman through employee testimony did just this.[1] The General Counsel's argument that Wyman wrongly or irrelevantly authenticated the petition with employee testimony thwarts *Levitz* and substitutes employer belief for objective fact. Accordingly, the General Counsel's arguments to the contrary must be disregarded.

[1] As explained in Wyman's brief in support of its exceptions, Wyman would have produced testimony from *all* petition signers to authenticate the petition, but the ALJ would not allow it. (Tr. 40:4-6.)

II. Wyman's request for an election in lieu of a bargaining order was appropriate.

The General Counsel also wrongly and, candidly, inappropriately attacks Wyman's reliance on *Scomas of Sausalito, LLC v. Nat'l Labor Relations Bd*., 849 F.3d 1147 (D.C. Cir. 2017). In doing so, he falsely editorializes Board precedent to argue that the Board cannot direct an election as a remedy in a withdrawal of recognition case. This is incorrect.

As Wyman established in its brief in support of its exceptions with reliance on *Scomas,* the Board can indeed fashion such a remedy in a case such as this. This is because often a bargaining order "give[s] no credence whatsoever to employee free choice." *Scomas of Sausalito, LLC* v. Nat'l Labor Relations Bd., 849 F.3d at 1157 (internal citations omitted). Accordingly, a bargaining order should not be imposed if the violation is "far from serious." *Id.* at 1156. Severity depends on whether the employer's conduct was "deliberate or calculated," whether it was "the genesis of [the] employees' desire to rid themselves of" the union, and whether it was so "flagrant" that ***an election cannot fairly be held***. *Id*. at 1156–57 (emphasis added).

Regardless of whether an election was in fact ordered in *Scomas,* the court made it clear that such a remedy may indeed be appropriate in a withdrawal of recognition case as opposed to a bargaining order, and explained the factors relevant in such an analysis. In many cases, like the one at hand, a bargaining order is not appropriate. Wyman's brief in support of its exceptions clearly outlined this argument, and the General Counsel's attempt to suggest that it was improper is disingenuous at best.

Similarly, the General Counsel argues that evidence offered by Wyman that establishes its good faith belief of the Union's loss of majority support is irrelevant. Yet, this argument too is thwarted by *Scomas*. In *Scomas,* the court found it significant that the employer's conduct was "far from deliberate or calculated;" instead, it was "unintentional." *Id*. at 1157. In fact, the court

specifically noted that the employer "acted in good faith." *Id.* This was indeed relevant, because it established that the employer would not "benefit from its own wrongs" absent a bargaining order. *Id.* In other words, the employer's conduct was not so flagrant that an election could not be held. Such is the case at hand.

Curiously, the General Counsel uses the same "benefit from its own wrongs" language to imply the Board could never direct an election. However, *Scomas* definitively holds to the contrary, and in fact uses this language to explain why a bargaining order is often ***not*** appropriate—not that an election is inappropriate. The General Counsel's argument regarding Wyman's reliance on *Scomas* is nothing more than an attempt to substitute his position for legal precedent. Accordingly, it must be ignored.

III. Conclusion

As explained in Wyman's brief in support of its exceptions, the Board should reverse the ALJ's decision with respect to his determination that the petition signed by a majority to the bargaining unit was invalid, uphold Wyman's withdrawal of recognition and dismiss any alleged unfair labor practices against Wyman. In the alternative, the Board should order that an election be held so that the employees' Section 7 rights can be honored. The General Counsel's answering brief does nothing to undermine Wyman's requests and should be disregarded.

Dated: November 9, 2018

Lori Armstrong Halber
Rick Grimaldi
Samantha Sherwood Bononno
FISHER & PHILLIPS LLP
150 N. Radnor Chester Rd., C300
Radnor, PA 19087
(610) 230-2150
lhalber@fisherphillips.com
rgrimaldi@fisherphillips.com
sbononno@fisherphillips.com

Attorneys for Wyman Gordon Pennsylvania, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2018, I e-filed the foregoing **RESPONDENT'S REPLY IN FURTHER SUPPORT OF ITS EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION** with the National Labor Relations Board's Office of the Executive Secretary, and served a copy of the foregoing document via e-mail to all parties in interest, as listed below:

Mr. Dennis P. Walsh
Regional Director
NLRB – Region 4
Dennis.Walsh@nlrb.gov

Antonia O. Domingo, Esquire
Nathan Kilbert, Esquire
United Steelworkers of America
adomingo@usw.org
nkilbert@usw.org

Mark Kaltenbach, Esquire
Office of the General Counsel
Mark.Kaltenbach@nlrb.gov

Lori Armstrong Halber